STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2014
v	No. 313785 Kent Circuit Court
JOSEF KENNETH WILLIAMSON, Defendant-Appellant.	LC No. 12-003355-FC

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to murder, MCL 750.83; aggravated stalking, MCL 750.411i; carrying a dangerous weapon with unlawful intent, MCL 750.226; possession of a firearm during the commission of a felony, MCL 750.227b; and assault with a dangerous weapon, MCL 750.82. The trial court sentenced defendant to 28 to 75 years' imprisonment for the assault with intent to murder conviction, three to five years' imprisonment for the aggravated stalking conviction and the carrying a dangerous weapon with unlawful intent conviction, two years' imprisonment for the felony-firearm conviction, and two to four years' imprisonment for the assault with a dangerous weapon conviction. Because we conclude that the trial court did not abuse its discretion by permitting the use of testimony from the preliminary examination in lieu of live testimony and that defendant's right to confrontation was not violated, we affirm.

Defendant's convictions arise from an incident involving Andrew Winfield and Erica Aguilera. Aguilera is defendant's former girlfriend, and Winfield and Aguilera were in a romantic relationship at the time of the incident. Winfield and Aguilera both testified at the preliminary examination. Their testimony was that on March 25, 2012, they were both on the front porch of their house when defendant called Winfield several times and threatened to kill him. Shortly after the telephone call, Winfield and Aguilera saw defendant's car coming up the street. Defendant fired a single shot that hit their van and a neighbor's home. After the police arrived, defendant called Winfield and admitted to shooting the van.

At the time of defendant's trial, the prosecution was unable to locate Winfield and Aguilera to testify. The prosecution moved for admission of Aguilera's and Winfield's preliminary examination testimony, and defendant raised a hearsay objection. The trial court held that the prosecution exercised due diligence and admitted the preliminary examination

testimony pursuant to MRE 804(b)(1). A recording of the previous testimony was played for the jury, and transcripts were also prepared.

On appeal, defendant argues that the prosecution failed to exercise due diligence in procuring Winfield and Aguilera for trial, and accordingly, that the trial court abused its discretion by permitting introduction of the preliminary examination testimony under MRE 804(b)(1).

A trial court's determination whether the prosecution exercised due diligence is reviewed for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The Michigan Rules of Evidence provide that former testimony, in certain situations, is not excluded as hearsay:

> (b) The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> (1) Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. [MRE 804(b)(1).]

A witness is unavailable when he "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5). To show that a witness is unavailable, "the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial." *Bean*, 457 Mich at 684. "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Id*. The prosecution must follow up on specific leads. See *People v McIntosh*, 389 Mich 82, 87; 204 NW2d 135 (1973).

When it moved for admission of the preliminary examination testimony, the prosecution set forth its efforts to locate Winfield and Aguilera on the record. The prosecution explained that it asked Winfield and Aguilera to keep their addresses and telephone numbers updated. Before trial, it called the telephone numbers and left several voicemails, and officers visited their address and discovered that they no longer lived there. After checking the jail, the prosecution discovered that Winfield was absconding on bond and a warrant was out for his arrest. The prosecution also overheard a jail conversation where defendant's sister speculated that Aguilera might be in Texas and Winfield in Illinois. The trial court found that the prosecution's efforts constituted due diligence. The trial court noted that with regard to Winfield, he was a "fugitive from justice" and since he could not be located on a bench warrant it was "unlikely" he would respond to a subpoena. Similarly, the trial court noted Aguilera apparently left the state.

Defendant argues that the prosecution did not use all reasonable means to procure Winfield and Aguilera because it did not search for the witnesses in Illinois or Texas. He

compares the case to *Bean*, 457 Mich at 686-688. In *Bean*, the Supreme Court held the prosecution failed to exercise due diligence when the police were informed by a relative of the missing witness that the witness may have moved to the District of Columbia with his mother, but it made no efforts to search for the witness there. *Id*. at 686-688. Here, however, the lead did not come from a relative, was not a direct attempt to assist the police, was speculative, and was not confined to one metropolitan area. Given the facts and circumstances of the lead, it was reasonable for the prosecution not to search for the witnesses in Texas and Illinois.

Defendant also argues that the prosecution knew that Winfield and Aguilera posed a risk of not appearing at trial. He compares this case to *People v Dye*, 431 Mich 58; 427 NW2d 501 (1988). In *Dye*, the Supreme Court held that the prosecution failed to use due diligence because it made no effort to locate the witnesses until shortly before trial when it knew "the witnesses were needed, they had expressed an intention to leave the state, and had incentives to go into hiding." *Id*. at 67-68. Here, there was no indication that there was any difficulty in procuring the attendance of Winfield and Aguilera at the preliminary examination, that the prosecution knew the witnesses were planning on leaving the state, or that either witness had any incentive to hide. See *id*. at 67, 76.

Although the prosecution made minimal efforts to procure Winfield and Aguilera for trial, there was no reasonable lead that it failed to investigate. "Due diligence requires that everything reasonable, not everything possible, be done." *People v Whetstone*, 119 Mich App 546, 552; 326 NW2d 552 (1982). Under the circumstances, we cannot conclude that the trial court abused its discretion by finding that the prosecution exercised due diligence. *Babcock*, 469 Mich at 269.

Defendant also argues that the admission of Winfield's and Aguilera's preliminary examination testimony violated his Sixth Amendment right to confrontation. Because defendant did not object on the basis of the Confrontation Clause to the admission of the preliminary examination testimony, this issue is unpreserved. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Unpreserved claims of constitutional error are reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004), quoting US Const, Am VI. Testimonial statements of a witness who does not appear at trial are only admissible if the defendant had a prior opportunity for cross-examination and the witness was unavailable to testify. *Crawford*, 541 US at 68.

Defendant argues that the Confrontation Clause was violated because Winfield and Aguilera were not "unavailable."[1] According to defendant, Winfield and Aguilera were not

[1] Defendant also claims that his right to confrontation was violated because the prosecution failed to use due diligence. However, defendant makes no new due diligence argument.

"unavailable" under *Crawford* because the case includes no language indicating that a witness is "unavailable" when the witness willfully fails to attend trial. Defendant also claims that the test for "unavailability" under MRE 804(a)(5) should not be used to determine whether a witness is "unavailable" under *Crawford*. Because defendant fails to cite any authority in support of his arguments, they are abandoned. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Nevertheless, even upon review of the issue, we find no merit to the arguments. First, a witness is unavailable for purposes of the Confrontation Clause if he or she is absent and the prosecutor made a good faith effort to obtain the witness's presence at trial. *Barber v Page*, 390 US 719, 724-725; 88 S Ct 1318; 20 L Ed 2d 255 (1968). Thus, whether a witness is unavailable does not depend on the intent of the witness but on the efforts of the prosecution. As previously discussed, the prosecution exercised due diligence in this case. Second, contrary to defendant's claim on appeal, MRE 804(a)(5) is used to determine unavailability under the Confrontation Clause. See *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008). Therefore, we conclude that defendant has failed to establish plain error. *Carines*, 460 Mich at 763.

Finally, defendant claims that trial counsel was ineffective for failing to preserve the Confrontation Clause issue at sentencing. However, because defendant's Confrontation Clause argument lacks merit, trial counsel was not ineffective for failing to raise an objection. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998) (holding that trial counsel "cannot be faulted for failing to raise an objection or motion that would have been futile").

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell